

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

NORTHWEST AQUATIC ECOSYSTEMS,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NOS. 05-035; 05-036; 05-046, 05-047

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

Appellant, Northwest Aquatic Ecosystems, is challenging denials of coverage under the Aquatic Nuisance Plant and Algae NPDES General Permit issued by the Washington Department of Ecology (Ecology) for the following lakes:

Lake Palmer	PCHB No. 05-035
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Lake Killarney, Cherry Pond	PCHB No. 05-036
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Lake Ketchum	PCHB No. 05-046
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Lake Arrowhead, Fawn Lake, Ken Lake	PCHB No. 05-047
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The hearing in the consolidated matter was conducted on May 6, 2005, in Lacey, Washington. Douglas Dorling represented Northwest Aquatic Ecosystems and Assistant Attorney General John Cooke represented Ecology. The Board was comprised of William H. Lynch, Bill Clarke, and David W. Danner. Administrative Appeals Judge, Phyllis K. Macleod presided for the Board and Randi Hamilton of Gene Barker and Associates, Olympia, Washington, recorded the proceedings.

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1 Witnesses were sworn and heard, exhibits were introduced, and the parties presented  
2 arguments to the Board. Ecology had approved the Integrated Aquatic Vegetation  
3 Management Plans for Lake Killarney, Lake Ketchum, and Cherry Pond prior to the hearing  
4 and those matters were not addressed during the proceedings. Based upon the evidence  
5 presented, the Board makes the following:

6 FINDINGS OF FACT

7 1.

8 Ecology is responsible for regulating the application of herbicides and algaecides into the  
9 waters of Washington State, in part, through its delegated operation of the National Pollutant  
10 Discharge Elimination System (NPDES) permit system. (RCW 90.48.260). On June 13, 2002,  
11 Ecology exercised this responsibility by issuing a general permit governing the application of  
12 herbicides and algaecides known as the Aquatic Nuisance Plant and Algae Control National  
13 Pollutant Discharge Elimination System Waste Discharge General Permit. (Aquatic Nuisance  
14 Permit). The permit became effective on July 5, 2002 and has a term of five years, expiring in  
15 July 2007.

16 2.

17 Northwest Aquatic is a company that provides treatment for nuisance plants and algae in  
18 a number of lakes within the state. The requirements enunciated in the Aquatic Nuisance Permit,  
19 particularly the need to develop an Integrated Aquatic Vegetation Management Plan (IAVMP),  
20 imposed new responsibilities on applicators such as Northwest Aquatic Ecosystems and its  
21 clients. The Permit allowed permittees five years of coverage under the general permit if an

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1 IAVMP was prepared for the lake and approved by Ecology. The need for such a plan was first  
2 initiated in the 2002 Aquatic Nuisance Permit. In preparing IAVMPs, meaningful analysis and  
3 effort is required to investigate relevant topics and develop long-term strategies for aquatic  
4 nuisance weed control. The Aquatic Nuisance Permit did allow permittees without an approved  
5 IAVMP to obtain two annual coverages during the five year permit period. A format for the  
6 IAVMP was attached as Appendix A to the General Permit.

7 3.

8 Aquatechnex, an aquatic nuisance treatment contractor, timely appealed the Aquatic  
9 Nuisance Permit in June 2002. The Pollution Control Hearings Board (PCHB) ultimately  
10 dismissed the appeal pursuant to a motion for summary judgment. The Aquatic Nuisance Permit  
11 remained effective and numerous lake associations were granted annual coverage during the first  
12 two lake treatment seasons without an approved IAVMP.

13 In 2004, however, when Northwest Aquatic filed applications with Ecology for permit  
14 coverage to treat twelve lakes during the 2004 treatment season, the coverage was denied.  
15 Ecology denied coverage because the applicants did not have approved IAVMPs and had already  
16 been allowed the two annual permit coverages available under the Aquatic Nuisance Permit  
17 without an approved IAVMP. Ecology believed additional coverage could not be extended  
18 under the terms of the general Aquatic Nuisance Permit until an IAVMP was approved.  
19 Northwest Aquatic appealed Ecology's denials to the PCHB. The Board consolidated the appeal  
20 actions for consideration. (PCHB Nos. 04-026, 04-027, 04-033, 04-038, 04-039, 04-040, 04-  
21 042, 04-043, 04-047, 04-048, 04-054).

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1 4.

2 Prior to the scheduled hearing date in this consolidated case, Northwest Aquatic entered  
3 into a settlement with Ecology. The settlement agreement concluded the issues in the case and  
4 served as the basis for dismissal of the appeals. The settlement allowed certain treatment to  
5 move forward for the 2004 season on the basis of conditionally approved IAVMPs for five of the  
6 twelve lakes. The conditional approval required applicants to submit revised IAVMPs no later  
7 than December 31, 2004, in order to be permitted to treat beyond the 2004 season. The  
8 settlement also allowed Northwest Aquatic Eco-Systems to submit IAVMPs for the remaining  
9 seven lakes for Ecology's conditional approval. The settlement required Ecology to develop a  
10 Nuisance Plants Checklist to assist parties in meeting the IAVMP requirement. Ecology did  
11 develop and issue such a checklist by the agreed deadline of July 15, 2004.

12 5.

13 The IAVMP approval process contemplated by Ecology begins with Ecology approval of  
14 a final draft IAVMP plan. This plan is then the subject of State Environmental Policy Act  
15 (SEPA) review. Only after SEPA review is Ecology willing to grant final approval of the  
16 IAVMP, if appropriate.

17 6.

18 With the possible exception of Lake Palmer, IAVMP plans for the lakes in controversy in  
19 this case were submitted to Ecology for approval on or before the December 31, 2004, date  
20 negotiated by the parties. Ecology reviewed the plans and notified the applicants of needed  
21 changes or corrections. The applicants made modifications and resubmitted the draft plans. By

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1 the date of the hearing, IAVMP approval had been granted for Lake Killarney, Lake Ketchum,  
2 and Cherry Pond. After the hearing, the Board received a status report indicating IAVMP  
3 approval had been issued for Ken Lake and was expected imminently for Fawn Lake as well.

4 7.

5 In or around February 2005, Northwest Aquatics filed Notices of Intent (NOIs) to  
6 Ecology seeking coverage under the Aquatic Nuisance General Permit for Palmer Lake, Lake  
7 Killarney, Cherry Pond, Lake Ketchum, Lake Arrowhead, Fawn Lake, and Ken Lake. Each of  
8 those lakes had already received two years of coverage under the Aquatic Nuisance Permit  
9 without an approved IAVMP. Northwest Aquatics had submitted IAVMPs for the lakes to  
10 Ecology for approval prior to seeking permit coverage, but Ecology had not yet approved the  
11 IAVMPs. Ecology denied the applications for coverage because the IAVMPs were not approved  
12 and further coverage under the Aquatic Nuisance Permit was contingent on having an Ecology-  
13 approved IAVMP.

14 8.

15 Ecology has limited staff available to review IAVMP plans submitted for approval.  
16 Despite considering the plans a priority, the review period has extended beyond the schedule  
17 contemplated by Ecology and the parties to the settlement agreement, which was designed to  
18 allow for treatment during the 2005 treatment season. (Ex. D) It has typically exceeded the  
19 ninety-day period recommended in Ecology guidance to Lake Management Associations in a  
20 letter dated July 15, 2004. (Ex. N) In referencing the need for IAVMP plans, the Department  
21 stated:

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1 Please remember this plan needs to be approved prior to lake treatment.  
2 Therefore, early submittal will be important in order to make sure there is  
3 time for plan approval. It is recommended that plans be submitted three  
4 months (90 days) prior to anticipated herbicide application dates.

4 (Ex. N)

5 9.

6 The lakes in controversy are lakes with private rather than public access. Appendix A to  
7 the Aquatic Nuisance Permit recognizes, "The following guidance is most appropriate for lakes  
8 with public access and multiple uses. Ecology expects that the amount of detail and public  
9 process incorporated in the plan should be proportional to the size, amount of public access, and  
10 uses of the waterbody to be treated." (Ex. R-1, p.27).

11 10.

12 The evidence demonstrated the IAVMP draft plan for Fawn Lake was submitted to  
13 Ecology for review in May 2004. Ecology completed its initial review on or around February  
14 18, 2005. Certain corrections were identified by Ecology in letters dated February 18, 2005, and  
15 March 4, 2005. The corrections were clerical in nature requiring such things as modification of a  
16 telephone number, reconciliation between 25 and 27 acres, and clarification of an inconsistency  
17 relating to targeting lily pads. The applicant made modifications and submitted a final draft on  
18 April 15, 2005. Ecology has allowed the Fawn Lake IAVMP to enter the State Environmental  
19 Policy Act (SEPA) review process. Plan approval is expected soon after completion of the  
20 SEPA process.

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11.

The Ken Lake IAVMP was submitted to Ecology May 7, 2004. As of the hearing in May 2005, final review of the revised plan had not been completed. The corrections identified by Ecology in its April 13, 2005 (Ex. R-10) letter to the applicants are clerical in nature, such as changing single words or including omitted material from a label. The plan, as of April 13, 2005, complies with the substantive provisions of Appendix A. The applicant incorporated suggested corrections into a revised plan filed for review. After the hearing, the Board requested and received a status report, which indicated the Ken Lake IAVMP has been approved by Ecology.

12.

The Lake Arrowhead IAVMP was in its third draft when Ecology wrote to Northwest Aquatics and the Lake Arrowhead Community Club in February 2005, identifying four issues needing correction or clarification in the Plan. (Ex. R-6). The four items were all addressed in subsequent submissions from the applicant. However, rather than approving the IAVMP for SEPA review, Ecology began a further review process based on the presence of a rare plant in the main basin of the lake. (Ex. R-5). Further consultations and plant surveys are apparently being required by Ecology before SEPA review is allowed on the IAVMP. (Testimony of Betsy Dickes). The applicant has indicated it would like to limit the pesticide applications to canal areas of the lake and avoid the main body completely. This would be consistent with past practices. Ecology will not approve the IAVMP or the plan to limit applications to the canals until the rare plant issue is further developed. (Ex. R-5). The applicant testified no damage to

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1 the rare species would occur through application of chemicals solely in the canal areas. No  
2 evidence was submitted indicating damage to the rare species would occur if chemicals were  
3 applied solely to the canal areas. The threat, if any, to this rare plant appears to occur if  
4 chemicals are applied in the main basin. (Ex. R-7).

5 13.

6 The draft IAVMP for Lake Palmer was submitted to Ecology for review. The date it was  
7 submitted is in dispute. By letter dated April 18, 2005, Ecology responded to the draft  
8 identifying a number of areas for correction. The existence of an outlet for the lake, the number  
9 of acres of vegetation, past management efforts, the condition of lakefront property, maps of  
10 aquatic plants, assessment of control levels, and site specific levels of control were specified as  
11 areas needing revision. Several of the deficiencies noted raise substantive issues relating to  
12 permit compliance and environmental protection.

13 14.

14 Northwest Aquatic timely appealed the NOI denials for Lake Palmer, Lake Killarney,  
15 Cherry Pond, Lake Ketchum, Lake Arrowhead, Fawn Lake, and Ken Lake to this Board where  
16 they were consolidated for hearing in this case. Prior to the hearing, the disputes over Lake  
17 Killarney, Cherry Pond, and Lake Ketchum were resolved and the matters were no longer in  
18 controversy. Testimony at hearing was limited to the remaining lakes – Palmer, Arrowhead,  
19 Fawn, and Ken.

20  
21  
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15.

Any Conclusion of Law deemed to be properly a Finding of Fact is hereby adopted as such.

From the foregoing Findings of Fact, the Board makes the following:

#### CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the subject matter of the case pursuant to RCW 43.21B. The Board reviews the case *de novo* and the burden of proof is on the appealing party. Northwest Aquatic Ecosystems must prove by a preponderance of the evidence the Ecology denials are in error.

2.

The legal issue presented in the case is:

Whether Ecology properly denied Northwest Aquatic Eco-Systems' application for coverage under the Aquatic Nuisance Plant and Algae Control General Permit (General Permit) for Lake Palmer, Lake Killarney, Cherry Pond, Lake Ketchum, Lake Arrowhead, Fawn Lake, and Ken Lake?

3.

Prior to the hearing, Ecology moved for summary judgment dismissing the case. The matter was considered by the Board on the basis of the documents filed. Notice of the Board's intentions in ruling on the motion was provided to the parties by letter dated April 27, 2005. A separate decision analyzing the issues raised on summary judgment has been entered. The Board granted the summary judgment motion as to certain arguments and denied the motion as to

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1 others. The case proceeded to hearing to determine the appropriateness of Ecology's action, or  
2 lack thereof, on the applications for coverage.

3 4.

4 The Board's ruling on summary judgment concluded the Board has jurisdiction to  
5 determine whether Ecology's denial of coverage under a general NPDES permit is correct.<sup>1</sup> To  
6 obtain coverage under the Aquatic Nuisance Permit, an applicant must meet the conditions for  
7 permit coverage. If those conditions are met, denial would not be appropriate.

8 5.

9 In this case, IAVMP approval is the one condition for coverage under the Aquatic  
10 Nuisance Permit that is in question. The standards for preparing an IAVMP are contained in  
11 Appendix A to the Aquatic Nuisance Permit. If the substantive provisions required by Appendix  
12 A are addressed adequately in an IAVMP, plan approval should be granted.

13 6.

14 The facts in this case demonstrate Ecology is having some difficulty reviewing and  
15 responding to submitted plans within a reasonable time period. All parties are aware that the  
16 application of pesticides to control aquatic nuisance plants is a time-sensitive activity. Despite  
17 Ecology's assertion that it is giving priority to the plans, it is still taking weeks or months to  
18  
19  
20

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21 <sup>1</sup> At the outset of the hearing the appellant withdrew allegations relating to the applicability of RCW 90.48.465(6) and, accordingly, the statute is not addressed in this decision.



1 respond to submitted plans and corrections. Ecology has not agreed to send plans to SEPA  
2 review unless all corrections and clarifications have been completed.<sup>2</sup>

3 7.

4 If an IAVMP submitted for review has only minor clerical errors, such as the Ken Lake  
5 Plan and the Fawn Lake Plan, the substantive criteria contained in Appendix A have been met  
6 and conditional approval is appropriate. The Board has previously ruled approval of coverage  
7 under a NPDES general permit can be approved subject to conditions adequate to ensure  
8 adequate protection. *Cascade Gateway Foundation v. Ecology, Cadman Inc., King County,*  
9 *PCHB No. 02-095 (Findings of Fact, Conclusions of Law and Order)(2003).* In *Cadman*, the  
10 Board upheld extension of coverage based upon the condition a monitoring network would be  
11 developed and approved. The coverage was conditioned on no mining occurring until the  
12 monitoring plan was approved. A similar approach is appropriate in this case.

13 8.

14 As to Fawn Lake and Ken Lake, the substantive requirements of Appendix A have been  
15 met. Further delay to review minor clerical revisions unreasonably delays the general permit

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16 <sup>2</sup> Indeed, it appears to the Board that Ecology's own process for reviewing IAVMPs works to frustrate timely  
17 completion of review. Ecology staff testified that after notifying the applicant of errors or omissions in an  
18 application, they do not limit review of subsequent drafts to determining if previously identified errors have been  
19 corrected. Instead, with each successive draft submitted, Ecology reopens the entire IAVMP for review, including  
20 those sections previously reviewed and for which no errors or omissions were identified. In our view, this cycle of  
21 repeated review undermines the certainty of the permit process without adding substantive environmental protection.  
While the Board is without authority to direct Ecology on how to use its resources, we note that Ecology could draft  
general permits in light of the resources available to it in a way that ensures the general permit program is  
implemented in a timely manner. If Ecology is without resources to timely implement this general permit program,  
as appears to be the case here, then the solution lies in reforming the general permit and the review process. In light  
of the similarities between IAVMPs and lake treatment methods, the untimely and repetitive review of IAVMPs  
undermines the objective of using general permits to protect water quality in situations with similar activities and  
potential water quality impacts.



1 coverage process. The application of chemicals to the water can be conditioned on enunciated  
2 corrections. In this case the denial of coverage to Fawn Lake and Ken Lake was unwarranted.

3 9.

4 Lake Arrowhead submitted an IAVMP and received a letter from Ecology indicating four  
5 items needed to be revised. (Ex. R-6). Each of the items was corrected, but Ecology refused to  
6 grant plan approval because a rare plant was identified as an issue in the Lake. Rather than  
7 approving the plan as amended, and restricting coverage for the main basin until a plan for  
8 protection of the rare plant species is approved, Ecology denied approval and prevented any  
9 treatment in the canal areas.

10 10.

11 Ecology has expressed reticence to condition approval or bifurcate the lake plan. The  
12 Fact Sheet for this permit (Ex. R-2), however, appears to contemplate applications for all or part  
13 of a lake in the Scope of Coverage section:

14 This permit covers the application of herbicides, algaecides, and aluminum  
15 sulfate to directly or indirectly reduce or eliminate aquatic nuisance weeds  
or algae. Specifically, this permit covers the following applications:

- 16 1. Application of herbicides and algaecides to lakes and reservoirs to  
17 control nuisance aquatic plants and maintain beneficial uses. These  
applications may be for the whole lake *or part of the lake*.

18 (Ex. R-2, p.6.)(emphasis added).

19 11.

20 The evidence presented indicated partial application to the canals had been done  
21 historically and that limiting the application of chemicals to the canals would not damage the

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1 rare plant species. Approval of coverage for applications to the main basin can be subject to  
2 completion of a plan amendment on the issue, approved by Ecology. Ecology has the authority  
3 to condition coverage decisions and the lack of a comprehensive plan to address the rare plant  
4 species in the main basin does not require disapproval of the IAVMP plan and denial of permit  
5 coverage for a defined part of the lake.

6 12.

7 The Palmer Lake IAVMP review identified a number of areas needing substantive  
8 revision including the location and area of aquatic vegetation, and specific information regarding  
9 controls. These deficiencies are more significant than the clerical ones identified by Ecology for  
10 Ken Lake and Fawn Lake. The Palmer Lake IAVMP does not comply with the substantive  
11 standards in Appendix A in its current form. Denial of IAVMP approval for Palmer Lake was  
12 justified under the facts of this case.

13 13.

14 Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby  
15 adopted as such.

16 Based upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the  
17 following

18 ORDER

- 19 1. Ecology's decisions to deny approval of the IAVMPs and refuse coverage under  
20 the Aquatic Nuisance General Permit for Fawn Lake and Ken Lake are reversed.

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To the extent approvals and/or coverage have been issued since the hearing, no further action is required.

2. Ecology's denial of IAVMP approval and coverage under the Aquatic Nuisance General Permit for Lake Arrowhead is reversed in part. The Department shall approve the IAVMP to the extent it authorizes application of chemicals solely in the canals. Extension of coverage to further areas in the lake under the Aquatic Nuisance Permit shall be conditioned on an approved supplement to the IAVMP plan providing protection to the rare species in the main basin.
3. Ecology's denial of IAVMP approval and coverage under the Aquatic Nuisance General Permit for Palmer Lake is sustained.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2005.

POLLUTION CONTROL HEARINGS BOARD

\_\_\_\_\_  
BILL CLARKE, CHAIR

\_\_\_\_\_  
WILLIAM H. LYNCH, MEMBER

\_\_\_\_\_  
DAVID W. DANNER, MEMBER

\_\_\_\_\_  
Phyllis K. Macleod  
Administrative Appeals Judge

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